National Steel Supply, Inc. *and* International Brotherhood of Trade Unions, Local 713. Cases 2–CA–36457 and 2–CA–36464

June 30, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On December 23, 2004, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. The General Counsel filed cross-exceptions and a supporting brief.[1]

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions except as specifically set forth below and to adopt the recommended Order as modified and set forth in full below.[2]

This case involves several alleged violations of Section 8(a)(1) and (3) of the Act during a union organizing campaign, including the discharge of and refusal to reinstate a majority of the bargaining unit employees after they engaged in a protected strike to protest the discharge of a coworker. We agree with the judge, for the reasons stated in his decision, that the Respondent violated Section 8(a)(1) on August 13, 2004[3] by interrogating employee Eric Atalaya about union activities, and that the Respondent violated Section 8(a)(3) and (1) on August 17 by terminating Atalaya.[4] As fully discussed below, we further find that the Respondent violated Section 8(a)(3) and (1) by issuing a written warning to Atalaya on August 16. We adopt the judge's conclusions that the Respondent violated Section 8(a)(3) and (1) by refusing to reinstate unfair labor practice strikers upon their August 17 unconditional offer to return to work and by subsequently discharging the strikers. Our reasoning is discussed below. Finally, we agree with the judge that a bargaining order is warranted under *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 613–614 (1969), and we adopt the judge's related finding that the Respondent violated Section 8(a)(5) and (1) by refusing to recognize and bargain with the Union.

1. The judge found, and we agree, that the Respondent violated Section 8(a)(3) and (1) by terminating Atalaya on August 17. The General Counsel excepts to the judge's failure to find that the Respondent also violated Section 8(a)(3) and (1) by issuing a written warning to Atalaya on August 16, the day before his termination. We find merit in the General Counsel's exception.

Atalaya worked in the Respondent's warehouse. About a year before the events at issue here, the Respondent issued two-way radios to Atalaya and Tamishwar Angad, the warehouse supervisor, so that the Respondent's office personnel could more easily communicate with Atalaya and Angad in the warehouse. On Monday, August 16, after consulting with President Vincent Anza, Vice President Joseph Anza issued a written warning to Atalaya for failing to answer radio calls. The warning stated:

> This letter is a written warning on poor job performance. You have continually failed to respond to radio calls regarding stock issues, receiving, and questions concerning orders in the warehouse.
>
> August 5, 2004—Jeovanni tried reaching you in the morning.
>
> August 11, 2004—Teresa tried reaching you in the afternoon.
>
> August 16, 2004—Sean and Joe tried in the morning and again in the afternoon Sean tried reaching you.
>
> If I do not see marked improvement in this area, it will lead to termination of employment.

Atalaya admitted that he sometimes failed to respond to calls and that he failed to respond on August 16. Joseph Anza testified that Atalaya's failure to answer radio calls had been a recurring problem for the last 3–4 weeks. However, it is not clear that Atalaya had ever

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's conclusions of law, remedy, and recommended Order and substitute a new notice to conform to our findings and to the Board's standard remedial language.

In addition, because most of the Respondent's employees are Spanish-speaking, we shall modify the recommended Order to provide that the Respondent post the attached notice to employees in both Spanish and English. See *Washington Fruit & Produce Co.*, 343 NLRB No. 125 fn. 3 (2004).

[3] All dates are in 2004 unless otherwise specified.

[4] We also adopt the judge's threshold finding that Atalaya was not a statutory supervisor.

There are no exceptions to the judge's finding that the Respondent also violated Sec. 8(a)(1) by threatening Atalaya on August 13 that the Respondent would "let people go" if the Respondent learned of a union campaign.

been disciplined for missing calls.[5] The written warning to Atalaya was the first written warning the Respondent had ever issued to an employee.

On the morning of August 17, Atalaya again failed to answer the radio. The Respondent immediately terminated him. The judge found that the termination violated Section 8(a)(3) and (1). He did not make a finding as to whether the written warning on August 16 was unlawful.

Our analysis of whether the warning violated Section 8(a)(3) and (1) is governed by the test articulated in *Wright Line*.[6] Under that test, the General Counsel must prove that antiunion animus was a substantial or motivating factor in the employment action. The elements commonly required to support such a showing are union or protected activity by the employee, employer knowledge of that activity, and antiunion animus on the part of the employer.[7] See *Willamette Industries*, 341 NLRB No. 75, slip op. at 3 (2004).

If the General Counsel makes the required initial showing, the burden then shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even in the absence of the employee's union activity. See *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). To establish this affirmative defense, "[a]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." *W. F. Bolin Co.*, 311 NLRB 1118, 1119 (1993), petition for review denied 70 F.3d 863 (6th Cir. 1995), Board's Order enfd. mem. 99 F.3d 1139 (6th Cir. 1996).

Here, the General Counsel has carried his burden to prove that Atalaya's union activity was a motivating factor in the warning. The record shows that Atalaya engaged in union activity. He attended two union meetings and signed an authorization card. Furthermore, we agree with the judge that the Respondent knew of Atalaya's union activity. We rely, as the judge did, on Supervisor Angad's attendance at two union meetings that Atalaya also attended and on the judge's discrediting of Angad's testimony that he did not tell his superiors about the meetings. We also rely on an August 17 statement made to the warehouse employees, who were discussing Atalaya's termination just before the strike. One of the Anzas, apparently Joseph Anza, told the employees, "If you want to follow your leader, follow him."[8] A reasonable inference from that statement is that Atalaya was perceived as a leader in the employees' efforts to organize.

The Respondent's antiunion animus is clear from Vincent Anza's August 13 unlawful interrogation of Atalaya and from Anza's accompanying unlawful threat to "let people go." The timing of the written warning to Atalaya also indicates that Atalaya's union activity was a motivating factor in the warning. Anza interrogated and threatened Atalaya on Friday, August 13. The written warning was issued the next business day, Monday, August 16. The warning lists 4 dates on which Atalaya allegedly failed to answer radio calls—August 5, 11, and twice on August 16. Joseph Anza testified that during the 3–4 weeks before the warning, Atalaya's failure to answer calls had become "a daily problem" and "had gotten progressively worse." As discussed above, despite the claimed severity and duration of the problem, the record is not clear that Atalaya had previously been disciplined. What is firmly established by the record is that the Respondent did not issue the written warning until shortly after Anza learned of the union campaign and only one business day after Anza unlawfully interrogated and threatened Atalaya.

Furthermore, the written warning to Atalaya was the first written warning the Respondent had ever issued to any employee and thus represented a significant departure from past practice. Vincent Anza testified that the Respondent's practice was to handle discharges and warnings verbally and without paperwork. Atalaya testified that when he was given the warning, he was told that

[5] Anza testified that Atalaya had been verbally warned. Atalaya denied any previous warnings. The judge did not resolve the conflict in testimony. Significantly, the written warning itself made no reference to any prior warnings.

[6] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[7] Regarding the *Wright Line* analysis, Member Schaumber notes that the General Counsel's initial burden of showing discriminatory motivation involves proving the employee's union activity, employer knowledge of the union activity, and animus against the employee's protected conduct. The Board and circuit courts of appeals have variously described the evidentiary elements of the General Counsel's initial burden of proof under *Wright Line*, sometimes adding as a fourth element, what is otherwise inferred under the *Wright Line* analysis, the necessity for there to be a causal nexus between the union animus (i.e., Sec. 7 animus) and the adverse employment action. See, e.g., *American Gardens Management Co.*, 338 NLRB 644, 645 (2002). As stated in *Shearer's Foods*, 340 NLRB No. 132, slip op. at 2 fn. 4 (2003), Member Schaumber agrees with this addition to the formulation.

[8] The judge found that this comment was made by Vincent Anza, and the Respondent does not except to that finding. However, the employees who testified about the comment said it was made by Vincent Anza's son. Vincent Anza has two sons: Joseph (the older son and the Respondent's Vice President) and Vincent Jr. (the younger son, who worked summers only). Although the employee witnesses were unsure of the name of the son who made the "follow your leader" comment, and initially said it was Vincent Jr., the employees later clarified their answers. One employee said that the comment was made by the older son (Joseph). The other employee first said that the comment was made by the younger son who worked in the summer (Vincent Jr.), but later said it was made by the son who worked for the Respondent year-round and was taking over the Company (Joseph).

the "rules and regulations of the company had changed, and I had to sign a letter." For all these reasons, we find that the General Counsel has demonstrated that Atalaya's union activity was a motivating factor in the written warning.[9] See *W. F. Bolin Co. v. NLRB*, 70 F.3d 863, 871 (6th Cir. 1995) (to support an inference of unlawful motivation, the Board looks to such factors as inconsistencies between the proffered reasons for the discipline and other actions of the employer, deviations from past practice, and proximity in time of the discipline to the union activity).

Therefore, the burden shifts to the Respondent to prove it would have taken the same action even in the absence of Atalaya's union activity. The Respondent must do more than establish that it *could* have issued a written warning to Atalaya for legitimate reasons. The Respondent must prove that it actually *would* have done so, even in the absence of Atalaya's union activity. See *W. F. Bolin*, supra at 1119. Here, there is no evidence that the Respondent had issued written warnings to other employees for any reason. Indeed, as explained above, the written warning to Atalaya was an abrupt departure from the Respondent's admitted practice of handling disciplinary matters without paperwork.

An employer, of course, has the right to determine when discipline is warranted and in what form, and we do not suggest that a particular form of discipline, such as a written warning, is necessarily unlawful solely because an employer has imposed it for the first time. "It is well established that '[t]he [B]oard cannot substitute its judgment for that of the employer' and decide what constitutes appropriate discipline." *Detroit Paneling Systems*, 330 NLRB 1170, 1171 fn. 6 (2000) (quoting *Corriveau & Routhier Cement Block v. NLRB*, 410 F.2d 347, 350 (1st Cir. 1969)). However, it is the role of the Board to evaluate whether the reasons the employer proffered for the discipline were the actual reasons or mere pretexts. Id. Because the General Counsel has shown that the discipline was unlawfully motivated, the Respondent must establish not merely that it could have issued the warning to Atalaya for legitimate reasons, but that it actually would have done so, even in the absence of his union activity. *W. F. Bolin*, supra at 1119. Under all the circumstances, we find that the Respondent has failed to carry that burden. Instead, the circumstances suggest that the Respondent seized upon Atalaya's failure to answer radio calls as a pretextual reason to discipline him and, the following day, to terminate him. Accordingly, we find that the warning violated Section 8(a)(3) and (1).[10]

2. We adopt the judge's finding that the strike that began on August 17 was an unfair labor practice strike to protest Atalaya's unlawful termination. We also adopt the judge's finding that the Union made an unconditional offer to return to work on August 17. Therefore, we agree with the judge that the Respondent violated Section 8(a)(3) and (1) by refusing to reinstate the unfair labor practice strikers upon the Union's August 17 offer to return.[11]

We need not decide whether the Respondent proved that it permanently replaced the strikers. First, unfair labor practice strikers are entitled to immediate reinstatement upon their unconditional offers to return to work, displacing any employees hired into their jobs, regardless of whether those employees were hired as permanent replacements. *Teledyne Still-Man*, 298 NLRB 982, 985 (1990), enfd. 938 F.2d 627 (6th Cir. 1991); *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 379 fn. 5 (1967). Second, there is no evidence that any replacements had been hired at the time of the Union's August 17 unconditional offer to return to work.[12]

3. The General Counsel excepts to the judge's failure to find that the Respondent admitted in an August 27

[9] Moreover, Atalaya's testimony calls into question the August 11 incident alleged in the warning. The warning states that Atalaya failed to answer a call from "Teresa" on that date. Theresa Stevalla is the Respondent's receptionist. Atalaya testified that Stevalla would have had no reason to call him and that she did not communicate with him on inventory matters, the purpose for which the radios were used. The Respondent did not call Stevalla to testify, nor did the Respondent's other witnesses explain the circumstances of the alleged August 11 incident.

[10] As stated above, we adopt the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) by terminating Atalaya. In making that finding, the judge noted that Atalaya "may have deserved some kind of warning" for missing the calls, but that he would not have been terminated absent his union activity. Again, although the Board cannot substitute its business judgment for that of the employer, it is the role of the Board and judge to evaluate whether the reasons offered by the employer for disciplining an employee were the actual reasons. In this context, the judge's statement does not establish that the judge found Atalaya's termination unlawful because the judge disagreed with the Respondent's choice of discipline. Rather, the statement represents the judge's evaluation of the Respondent's actual motive for the termination. The judge determined that even if Atalaya's failure to answer calls may have constituted misconduct, the Respondent failed to prove it would have discharged Atalaya for that misconduct absent his union activity.

[11] We find it unnecessary to pass on whether the Union's August 25 telegram constituted a second unconditional offer to return to work. A finding that the Respondent also refused to reinstate the strikers on August 25 would be cumulative and would not affect the remedy.

[12] The judge made an alternative finding that even if the strike was an economic strike, the Respondent's refusal to reinstate the strikers violated Sec. 8(a)(3) and (1). We agree with his conclusion, because there is no evidence that any replacements had been hired at the time of the Union's August 17 unconditional offer to return to work. Therefore, even if the strikers were economic strikers, they were entitled to immediate reinstatement upon that offer.

letter to the Union that the Respondent had discharged the strikers. The letter, written by the Respondent's counsel, stated:

> Please be advised that I represent National Steel Supply, Inc. My client has forwarded to me a telegram from you, sent at 3:21 p.m. on August 25, 2004. In your telegram you request that my client "re-instate the employees . . . who were terminated for their union activity."
>
> My client's position is that none of its employees was terminated as a result of their union activities. Certain of the employees of National Steel Supply, Inc., commenced a strike on Tuesday, August 17, 2004. Since the commencement of that strike, each of the striking employees has been replaced, *and the employment of each replaced employee was thereafter terminated.*
>
> (Emphasis supplied.)

The judge concluded that the Respondent unlawfully discharged the strikers, but he did not expressly state the basis for that finding or discuss the August 27 letter.

An employer violates Section 8(a)(3) and (1) by terminating employees for engaging in a lawful strike. See *Flat Dog Productions*, 331 NLRB 1571, 1573 (2000), enfd. 34 Fed. Appx. 548 (9th Cir. 2002). We agree with the General Counsel that the Respondent's August 27 letter would reasonably have led the striking employees to conclude that they had been discharged. See id. at 1571. Therefore, the Respondent violated Section 8(a)(3) and (1) by discharging the strikers on August 27.

4. The Respondent excepts to the judge's recommendation that the Board issue a bargaining order under *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 613–614 (1969). The Respondent contends that a bargaining order is inappropriate because the judge erred in finding the underlying violations. Alternatively, the Respondent contends that "even if some violations are found," they do not warrant a bargaining order. We agree with the judge that a bargaining order is necessary.

As a preliminary matter, the record supports the judge's finding that the Union attained majority status as the unit employees' collective-bargaining representative on July 31, 2004, in an appropriate unit consisting of drivers and warehouse employees at the Respondent's Bronx location. The Respondent admits the appropriateness of the unit. The record contains copies of authorization cards from a majority of the unit employees. The cards were authenticated, some by the employee signers themselves, and others by Union Representative Jordan El-Haq, who testified that he witnessed the cards being signed.

The Board will issue a *Gissel* bargaining order in two categories of cases, known as "category I" and "category II" cases. Category I involves "exceptional cases" marked by unfair labor practices so "outrageous" and "pervasive" that traditional remedies cannot erase their coercive effects, thus rendering a fair election impossible. Id. at 613; see also *Allied General Services*, 329 NLRB 568 (1999); *Cassis Mgt. Corp.*, 323 NLRB 456, 459 (1997), enfd. mem. 152 F.3d 917 (2d Cir. 1998), cert. denied 525 U.S. 983 (1998); *Power, Inc.*, 311 NLRB 599, 600 (1993), enfd. 40 F.3d 409 (D.C. Cir. 1994). Category II involves "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes." *Gissel*, supra at 614. For the reasons stated below, we find that the violations here are sufficiently outrageous and pervasive to warrant a bargaining order under category I.

On August 13, the Respondent unlawfully interrogated Atalaya about employees' union activity and threatened to "let people go" if the Respondent learned of a union campaign. On August 16 and 17, within days of the unlawful threat and interrogation, the Respondent unlawfully warned and then discharged Atalaya because of his union activity. Also on August 17, within hours of the Union's demand for recognition, the Respondent unlawfully refused to reinstate 27 of the 31 bargaining unit members—over 85 percent of the unit—after they engaged in a protected strike. On August 27, the Respondent notified the Union that the Respondent had terminated the strikers.

Several significant factors militate in favor of a bargaining order. There is a strong likelihood that the Respondent's unfair labor practices will have a pervasive and lasting effect on the Respondent's employees' exercise of their Section 7 rights. The Respondent's response to the union campaign was swift and severe, beginning with the interrogation and threat of job loss by the Respondent's highest ranking officer, Vincent Anza. The Respondent quickly demonstrated that Anza's threat was not an empty one by unlawfully warning and then abruptly terminating Atalaya, whom it perceived to be the leader of the employees' organizational efforts. Atalaya's unlawful termination was followed in short order by the refusal to reinstate the unfair labor practice strikers, and, finally, by the termination of the strikers. The Respondent's unlawful conduct directly affected over 85 percent of the unit.[13]

[13] Even without evidence that the Respondent continued to engage in antiunion activity after the violations involved here, the absence of any further violations may just mean that the employer "had accomplished

Threats of job loss and the actual discharge of union adherents are "hallmark" violations, which are highly coercive because of their potentially long-lasting impact. See *NLRB v. Jamaica Towing*, 632 F.2d 208, 212 (2d Cir. 1980). See also *NLRB v. Longhorn Transfer Service*, 346 F.2d 1003, 1006 (5th Cir. 1965) ("Obviously the discharge of a leading union advocate is a most effective method of undermining a union organizational effort."). Furthermore, "[m]ass discharges leave no doubt as to the response that the employees will reasonably fear from their employer if, after reinstatement, they persist in their support for a union." *Allied*, supra at 570 (quoting *Cassis*, supra at 459); see also *NLRB v. Gordon*, 792 F.2d 29, 33–34 (2d Cir. 1986), cert. denied 479 U.S. 931 (1986) (enforcing bargaining order where respondent unlawfully discharged entire unit). It is reasonable to infer that the Respondent's harsh message will have a lasting effect on the unit employees' exercise of their right to organize. Terminating a majority of the bargaining unit is unlawful conduct that "goes to the very heart of the Act" and is not likely to be forgotten. *Consec Security*, 325 NLRB 453, 454 (1998), enfd. mem. 185 F.3d 862 (3d Cir. 1999). The impact of the violations is heightened by the small size of the unit and the direct involvement of the Respondent's highest ranking officers, President Vincent Anza and Vice President Joseph Anza.[14]

For all of these reasons, "the Respondent's conduct places it in the realm of those exceptional cases warranting a bargaining order under category I of the *Gissel* standard, such that traditional remedies cannot erase the coercive effects of the conduct, making the holding of a fair election impossible." *Allied*, supra at 570 (footnote omitted). Accordingly, we adopt the judge's recommended bargaining order.[15]

AMENDED CONCLUSIONS OF LAW

Insert the following as Conclusions of Law 7 and 8, and renumber the subsequent paragraphs accordingly:

"7. By issuing a written warning to Eric Atalaya in retaliation for his union activity, the Respondent has violated Section 8(a)(3) and (1) of the Act.

8. By failing and refusing to reinstate unfair labor practice strikers to their former positions upon the Union's August 17, 2004 unconditional offer to return to work, the Respondent has violated Section 8(a)(3) and (1) of the Act."

AMENDED REMEDY

In addition to the remedy recommended by the judge, having found that the Respondent violated Section 8(a)(3) and (1) by issuing a written warning to Eric Atalaya, we shall order the Respondent to cease and desist and to take certain affirmative action necessary to effectuate the policies of the Act. Specifically, we shall order the Respondent to remove from its records any reference to the unlawful warning, and to notify Atalaya that this has been done and that the warning will not be held against him in any way.

We shall also modify the list of discriminatees in the judge's recommended Order to include Narces Guillen and Feliciano Cruz, whose names were inadvertently omitted.[16]

its short-term objectives[,]" and "[t]here was no further dirty work to be done." *NLRB v. Horizon Air Services*, 761 F.2d 22, 32 (1st Cir. 1985).

[14] There has been a relatively short time period between the unfair labor practices and the issuance of the instant Order. There is no evidence of substantial employee turnover other than that caused by the unlawful discharge of the striking employees. See *Gordon*, supra at 34 ("It would defy reason to permit an employer to deflect a *Gissel* bargaining order on the ground of employee turnover when that turnover has resulted from the employer's unlawful discharge of all of the members of the bargaining unit."). Nor has there been turnover among the management officials responsible for the unlawful conduct. At the time of the hearing, Vincent and Joseph Anza were still the Respondent's president and vice president, and the Respondent does not contend that they have since left the Company. In any event, the Respondent does not argue that the passage of time, employee or management turnover, or other changed circumstances have dissipated any lasting effects of these unfair labor practices. Accordingly, these issues, which have concerned some courts in denying enforcement of the Board's *Gissel* orders, are not present in this case.

[15] In a category I case like this one, both the Second Circuit and the District of Columbia Circuit have held that the Board need not make detailed findings of the type required for category II cases. See *Kaynard v. MMIC, Inc.*, 734 F.2d 950, 954 (2d Cir. 1984) ("Our decisions . . . relating to Board issued bargaining orders have always recognized, as, indeed, the Supreme Court's holding in [*Gissel*] compelled, that extensive analysis of other factors is not required as a condition of issuing a bargaining order in cases falling within the first category of *Gissel*, to wit, '"exceptional" cases marked by "outrageous" and "pervasive" unfair labor practices,' which render a fair election impossible."); *Power*, 40 F.3d at 422 (the Board "need not make detailed findings of the type required for category II cases, but instead must only make 'minimal findings' of the lasting effect of unfair labor practices to support a bargaining order.") (quoting *Amazing Stores, Inc. v. NLRB*, 887 F.2d 328, 331 (D.C. Cir. 1989), cert. denied 494 U.S. 1029 (1990)). Consistent with the courts' decisions, we have set forth above our reasons for finding that the detrimental effects of the unfair labor practices will persist over time.

[16] We have adopted the judge's findings that the Respondent violated Sec. 8(a)(3) and (1) by discharging and refusing to reinstate the employees who engaged in the strike to protest Atalaya's termination. Because the complaint alleges that the Respondent discharged and refused to reinstate the drivers and warehouse employees at the Bronx facility, "including but not limited to" the employees specifically named in the complaint, we shall extend remedial relief to employees similarly situated to the named employees. It is well established that "both named and unnamed discriminatees are entitled to a reinstatement and make-whole remedy in a situation, as here, where the General

ORDER[17]

The Respondent, National Steel Supply, Inc., Bronx, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees about their union activities.

(b) Threatening employees with job loss if they support a union.

(c) Discharging or issuing written warnings to employees because of their support or activities on behalf of International Brotherhood of Trade Unions, Local 713, or because they engaged in a lawful strike.

(d) Refusing to reinstate unfair labor practice strikers to their former positions upon the Union's unconditional offer to return to work.

(e) Refusing to recognize and bargain collectively with the Union as the exclusive collective-bargaining representative of the employees in the unit described below.

(f) In any other manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time drivers and warehousemen employed by the Respondent at its Bronx, New York facility; but excluding all office employees, clerical employees, and guards, professional employees and supervisors as defined in the Act.

(b) Within 14 days from the date of this Order, if the Respondent has not already done so, offer Eric Atalaya, Graciano Aguilar, Carlos Cruz, Feliciano Cruz, Roberto Gonzalez, Sotero Gonzalez, Narces Guillen, Marcelino Maldonado, Felipe Mencias, Policarpo Mencias, Narcizo Rodriguez, Adrian Umanzor, Jorge Flores, Artemio Ramirez, Alejandro Tale, Maximino Flores, Tomas Flores, Ryan Naipaul, Porfirio Perez, Telesforo Perez, Heriberto Sanchez, Sergio Batres, Sergio de la Cruz, Jose Gonzalez, Jose Luis Hilaro, Juan Carlos Restrepo, Jamie Sanchez, Edgar Ochoa, and similarly situated employees who engaged in the strike to protest Atalaya's termination, full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, dismissing, if necessary, any persons engaged as replacements.

(c) Make whole, with interest, the employees named above for any loss of earnings and other benefits they suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline, discharges, and refusals to reinstate, and within 3 days thereafter, notify the employees in writing that this has been done and that the unlawful discipline, discharges, and refusals to reinstate will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Bronx, New York, copies of the attached

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Counsel has alleged and proven discrimination against a defined and easily identifiable class of employees." *Pirelli Cable Corp.*, 331 NLRB 1538, 1542 fn. 21 (2000); *Morton Metal Works*, 310 NLRB 195 (1993), enfd. 9 F.3d 108 (6th Cir. 1993); accord: *Grand Rapids Press*, 325 NLRB 915 (1998), enfd. mem. 208 F.3d 214 (6th Cir. 2000). In this case, the defined and easily identifiable class consists of the Bronx drivers and warehouse employees who struck to protest Atalaya's termination. To the extent there are any such individuals not specifically named in our Order, their identity shall be ascertained at the compliance stage. *Pirelli*, supra; *Morton Metal*, supra; *Grand Rapids*, supra.

[17] We have modified the judge's recommended Order to include a broad cease-and-desist order. See., e.g., *United Scrap Metal, Inc.*, 344 NLRB No. 55, slip op. at 2 fn. 8 (2005) (broad cease-and-desist order provided because of serious nature of violations and egregious misconduct demonstrating a general disregard for employees' fundamental rights); *America's Best Quality Coatings Corp.*, 313 NLRB 470, 473 (1993) (same), enfd. 44 F.3d 516 (7th Cir. 1995), cert. denied 515 U.S. 1158 (1995). Accord: *NLRB v. Blake Construction Co.*, 663 F.2d 272, 285 (D.C. Cir. 1981) (upholding broad cease-and-desist order in light of egregious unfair labor practices). We have substituted a new notice to comport with these modifications.

In light of the Supreme Court's admonitions to the Board concerning the use of broad cease-and-desist orders, see *NLRB v. Express Publishing Co.*, 312 U.S. 426 (1941), the specificity requirements of Fed. R. Civ. P. 65(d) that render such orders exceedingly difficult to enforce, and the fact that we are already issuing an affirmative bargaining order, Member Schaumber believes that traditional remedies, including a "narrow" cease-and-desist order restraining "any like or related" violations of Sec. 8(a)(1) and (3), are appropriate and sufficient to address the violations in the instant case. He, therefore, dissents from the issuance of a broad order restraining "any" violations of the Act.

notice marked "Appendix."[18] Copies of the notice, in English and Spanish, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 13, 2004.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 30, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively interrogate employees about their union activities.

WE WILL NOT threaten our employees with job loss because of their support for a union.

WE WILL NOT discharge or issue written warnings to our employees because of their union membership, activities or support, or because they engaged in a lawful strike.

WE WILL NOT refuse to reinstate unfair labor practice strikers to their former positions upon the Union's unconditional offer to return to work.

WE WILL NOT refuse to recognize and bargain collectively with the International Brotherhood of Trade Unions, Local 713, as the exclusive collective-bargaining agent of our drivers and warehouse employees located in the Bronx, New York.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the rights guaranteed to them by Section 7 of the Act.

WE WILL, on request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time drivers and warehousemen employed by the Respondent at its Bronx, New York facility; but excluding all office employees, clerical employees, and guards, professional employees and supervisors as defined in the Act.

WE WILL, within 14 days from the date of the Board's Order, if we have not already done so, offer Eric Atalaya, Graciano Aguilar, Carlos Cruz, Feliciano Cruz, Roberto Gonzalez, Sotero Gonzalez, Narces Guillen, Marcelino Maldonado, Felipe Mencias, Policarpo Mencias, Narcizo Rodriguez, Adrian Umanzor, Jorge Flores, Artemio Ramirez, Alejandro Tale, Maximino Flores, Tomas Flores, Ryan Naipaul, Porfirio Perez, Telesforo Perez, Heriberto Sanchez, Sergio Batres, Sergio de la Cruz, Jose Gonzalez, Jose Luis Hilaro, Juan Carlos Restrepo, Jamie Sanchez, Edgar Ochoa, and similarly situated employees who engaged in the strike to protest Atalaya's termination, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, dismissing, if necessary, any persons engaged as replacements.

WE WILL make whole, with interest, the employees named above for any loss of earnings and other benefits suffered as a result of the discrimination against them.

[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discipline, discharges, and refusals to reinstate, and within 3 days thereafter, we will notify the employees in writing that this has been done and that these actions will not be used against them in any way.

NATIONAL STEEL SUPPLY, INC.

Jamie Rucker Esq., for the General Counsel.
Henry Hamburger Esq., for the Respondent.
Jordan El Haq, Representative, for the Union.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. I heard this case in New York City on October 20 to 25, 2004. The charge and amended charge in Case 2–CA–36457 were filed on August 17 and 26, 2004. The charge in Case 2–CA–36464 was filed on August 18, 2004. The complaint was issued on September 17, 2004, and alleged as follows:

1. That on or about August 13, 2004, the Respondent by its owner, Vincent Anza Sr., interrogated employees about their union activities and threatened them with discharge.

2. That on or about August 17, 2004, the Respondent by Vincent Anza, Jr. and/or Joseph Anza, threatened employees with discharge if they supported the Union.

3. That on or about August 16 and 17, 2004, the Respondent, for discriminatory reasons, first issued a warning to and then discharged Eric Atalaya.

4. That on or about August 17, 2004, the Respondent, for discriminatory reasons discharged five truckdrivers.

5. That on or about August 17, 2004, the Respondent, for discriminatory reasons discharged approximately 25 its warehouse employees.

6. Alternatively, that on or about August 17, 2004, the 25 warehouse employees ceased work and engaged in a strike but that after they or their representative made an oral unconditional offer to return to work, the Respondent failed to reinstate them.

7. That between July 31 and August 3, 2004, a majority of the employees in a unit consisting of all full-time and regular part-time drivers and warehouse employees designated the Union as their collective-bargaining representative.

8. That notwithstanding the Union's request for bargaining, the Respondent's violations noted above made a fair election impossible so that a bargaining order is required. Based on the evidence as a whole, including my observation of the demeanor of the witnesses and after consideration of the briefs filed, I hereby make the following findings and conclusions.

FINDINGS AND CONCLUSIONS

I. JURISDICTION

It is admitted and I find that the Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also is admitted that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Respondent is a New York corporation with a place of business in the Bronx where it is engaged in the wholesale supply of steel products to companies in the building and construction industry. Steel in various forms is purchased by it and resold out of a warehouse and yard located on Havemeyer Avenue. Apart from the people who work in the office, there are about 25 employees who work in the warehouse or yard. They gather, package and load goods for delivery to the Company's customers. There are also about six employees who drive trucks.

The Respondent contends that one of the alleged discriminates, Eric Atalaya, is a supervisor within the meaning of Section 2(11) of the Act. I do not agree.

Atalaya credibly testified that he works in the warehouse where he mainly operates a forklift. His other main duty is to hand out "orders" to the other warehouse workers who pull materials out of their storage locations for loading on trucks. In this regard, the order is simply a piece of paper describing a particular customer's purchase that is prepared by the office employees. Upon receipt of this order Atalaya then turns around and gives it to the first available warehouse worker who is then responsible for filling the order. Thus, insofar as Atalaya "assigns" work to employees, this function is, in my opinion, routine and lacking in the exercise of independent judgment.

The Respondent's witnesses testified that Atalaya had the authority to discharge employees and claimed that he had done so on four occasions in the past. Nevertheless, Vincent Anza conceded that he had no direct knowledge that Atalaya had discharged anyone, that he had no knowledge as to when these individuals were discharged and that there were no records that would substantiate the assertion that these employees were discharged by Atalaya. Joseph Anza admitted that he had no direct knowledge of two of the four individuals allegedly discharged by Atalaya. He testified that his knowledge of the other two discharges was based on conversations he had with Atalaya. But as to these two, Atalaya credibly denied that he had any such conversations with Joseph Anza.

Atalaya credibly denied that he ever discharged any employees, (or that he ever recommended their discharge), and the Respondent has produced no one who could offer any direct evidence, by way of witnesses or documentary evidence, to contradict Atalaya.

The Respondent asserted that Atalaya set the lunchbreaks for the employees and that he was the one who determined when the employees left work at the end of the day. But in both respects, the evidence simply showed that Atalaya exercised no independent judgment and that his directions were routine at best. As to lunches, the Company had a procedure whereby the warehouse employees rotated their lunch periods so that someone was available at all times. And as to going home, the evidence was that employees were told to go home when their assigned work was done for the day.

Where an assertion is made that an individual is a supervisor within the meaning of the Act, the burden of proof is on the party making the assertion. *Wilshire at Lakewood*, 343 NLRB No. 23, (2004); *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001); *East Village Nursing & Rehabilitation Center*

v. NLRB, 165 F.3.d 960, 962 (D.C. Cir. 1999). As the evidence in this case does not show that Atalaya exercised any of the functions described in Section 2(11) of the Act, I conclude that he was not a supervisor within the meaning of the Act.

On or about July 31, 2004, Union organizer El-Haq, met with employees of the Company in the parking lot of Home Depot, which is near the Respondent's facility. At this meeting, at least 22 employees signed cards authorizing the Union to represent them for collective-bargaining purposes. These were the drivers and warehouse employees. The evidence therefore shows that as of July 31, 2004, the Union had obtained authorization cards from a majority of the drivers and warehouse employees, a group that would constitute a unit appropriate for bargaining within the meaning of Section 9(a) of the Act.

Another union meeting at a somewhat more distant location was held on Saturday, August 7, 2004. I note that Tamishwar Angad, whom both sides agree is a warehouse supervisor, attended both meetings. Although Angad testified that he did not tell his superiors about the two union meetings, I don't think that this is likely or credible.

On Friday, August 13, 2004, Eric Atalaya was asked to remain after work by Vincent Anza. And when he was asked if Atalaya knew anything about a union organizing effort, Atalaya said that he did not. According to Atalaya's credited testimony, Anza said that if he found out about a union drive he was going to let people go.

With respect to the above, Vincent Anza testified that he did question Atalaya about a union as he had received an anonymous phone call telling him about a union drive amongst his employees. He denied however, that he threatened to discharge anyone. Of these two versions, which are not that different, I am going to credit the testimony of Atalaya.

On Monday, August 16, 2004, Atalaya received a warning allegedly for failing to answer the radio promptly. (In fact, Atalaya admits that on August 16, 2004, he failed to answer a radio call). In this regard, the evidence was that the Company had issued radios to Atalaya and Angad so that they could more easily communicate with the office if a question arose. These were issued to supplement the telephones that were in the warehouse and the loudspeaker system that was already in place. The radios were therefore a more convenient way for the office to communicate with Atalaya and Angad but were not, in my opinion, crucially different from what had existed before. In any event, the evidence was that at various times *both* Atalaya and Angad missed calls either because they were busy doing something else at the time or because the noise level was to high, or because the batteries were low. I note that apart from the merits of the warning, it appears that this was the first time that the Company gave a written warning to any employee for any reason.

On Tuesday, August 17, 2004, the Union sent a telegram to the Respondent in which it claimed that it represented a majority of the employees and demanded recognition. *This was received by the Company at 9:36 a.m.*

Joseph Anza testified that at some point on Tuesday morning, he heard that Atalaya failed to answer another radio call and that this had resulted in the loss of a customer order. As to this, Atalaya admits that he missed the call but I think that the Company asserts too much when it claims that it lost an order because of this. There were, as noted above, alternate means of reaching Atalaya. (Like the phone or the public address system.)

In any event, Joseph Anza testified that although he considered Atalaya to be an excellent employee in all other respects, he decided that enough was enough and that having again failed to answer the radio call, he could no longer keep Atalaya employed. Joseph Anza could not say with certainty as to when he made his decision on Tuesday morning although he did testify that it had to have been made sometime between 9 and 10 a.m. Therefore, based on his own testimony, it could very well have been made after 9:35 a.m., when the Union's telegram was received.

According to Joseph Anza, he wrote up a letter of termination for Atalaya somewhere between 10 and 10:30 a.m. and he gave this to Giovani to deliver to Atalaya at about 10:30 a.m. After Atalaya left the premises, he called driver Narces Guillen to tell him that he had been fired. Guillen in turn called the other drivers and of the six drivers out on the road that day, five decided to return to the shop without making their deliveries. (They began to arrive back at the warehouse at around 12:15 p.m.) Also during the morning, the warehouse employees stopped working and gathered together to talk about Atalaya's discharge. As they were doing so, Vincent Anza came by and said, "If you want to follow your leader, follow him." At that point, the warehouse employees left and gathered outside on the street in what must have looked like a work stoppage to the owners.

Union Representative El-Haq arrived at the Company's facility between 2 p.m. and 3 p.m. He testified that he asked Joseph Anza to put the employees back to work but that Anza refused to answer him.

According to Joseph Anza, he and his father decided during that first day they had to find replacements and *to terminate the employees as replacements were obtained*. In this respect, he had a form letter prepared which he attempted to deliver to some of the workers on August 18, 2004. This read:

> This letter is to notify you that you have been terminated by National Steel Supply. You have abandoned your job and have been replaced.
>
> Your employment with us is terminated effective immediately.[1]

On August 17, 2004 and on the days that followed, the Company hired new workers and it kept on file a series of the above-cited letter addressed to the individuals it considered to have been discharged. Thus, on August 17, the Company made a record indicating that it discharged Graciano Aguilar, Carlos Cruz, Roberto Gonzalez, Sotero Gonzalez, Marcelino Maldonado, Felipe Mencias, Policarpo Mencias, Narcizo Rodriguez, and Adrian Umanzor. On August 19, the Company

[1] This letter was prepared before the Company hired labor counsel. In a way it sort of illustrates that laypersons do not make any distinction between discharging strikers and permanently replacing them. In order to appreciate the difference, it apparently takes at least one course in Labor Law.

made a record that on this date it discharged Jorge Flores, Artemio Ramirez and Alejandro Tale. On August 20, the Company made a record that on this date it discharged Maximino Flores, Tomas Flores, Ryan Naipaul, Porfirio Perez, Telesforo Perez, and Heriberto Sanchez. On August 24, the Company made a record that on this date it discharged Sergio Batres, Sergio de la Cruz, Jose Gonzalez, Jose Luis Hilaro, Juan Carlos Restrepo, and Jamie Sanchez. And on August 26, the Company made a record that on this date it discharged Edgar Ochoa.

On August 25, 2004, the Union sent a telegram to the employer that stated as follows:

> Local 713, I.B.O.T.U. is requesting that you reinstate the employees of National Steel Supply who were terminated for their union activity. Those employees have informed us that they are able and ready to resume work immediately.

The Respondent did not respond to the Union's August 25, 2004 telegram. However, the evidence does show that a four of the strikers were rehired at some point and that a fifth person, who may not have been a striker, returned to work after his vacation ended.

As noted above, the Employer essentially concedes that it discharged the individuals that it believed were engaged in a strike. I also note that to the extent that the Respondent hired replacements, it produced no evidence that these were permanent as opposed to temporary replacements. There also was no evidence that the Respondent offered reinstatement to any of the strikers when replacements left.

III. ANALYSIS

I have already stated my reasons for concluding that Eric Atalaya was not a supervisor within the meaning of Section 2(11) of the Act. Therefore, if I conclude that he was discharged, principally because of his union activities, then that discharge would violate Section 8(a)(1) and (3) of the Act.

The facts show that no later than Friday, August 13, 2004, the Employer was aware of its employees' union activities. Thus, Supervisor Angad had attended two union meetings held on July 31 and August 7. And although he asserted that he did not tell his superiors about these meetings, I view with great skepticism, the assertion by Vincent Anza, that it was an *anonymous* phone call by which he first learned of the union activity.

The evidence shows that on that Friday, (August 13), Vincent Anza questioned both Atalaya and Angad about the Union. (This is admitted by Anza). In addition, I credit Atalaya's testimony that Anza said that if he found out about a union drive, he was going to let people go. I therefore conclude that by this transaction, the Respondent violated Section 8(a)(1) of the Act, inasmuch as I conclude that Vincent Anza engaged in coercive interrogation and that he threatened employees with discharge.[2]

Atalaya received a written warning on August 16 for failing to answer a radio call made to him in the warehouse. Atalaya admits that this was the case. Atalaya also admits that on the following day, he missed another radio call. The Respondent asserts that the fact that Atalaya failed to respond to radio calls made to him on these and previous occasions, was the reason that he was discharged. Notwithstanding that assertion, I do not believe it to be true.

The evidence indicates that Atalaya was the first person who had ever received a written warning even though there have been employees who have previously been discharged. The decision to issue a written warning was made right after the Employer became aware of the Union's organizing campaign.

In addition, the evidence also shows that the Respondent considered Atalaya to be a good worker and the evidence demonstrates that Angad also missed calls on occasion. That Atalaya may have deserved some kind of warning for missing the calls is perhaps likely. On the other hand, it is my opinion, that he would have been discharged for these offenses is so improbable as to be not credible.

According to Joseph Anza, the decision to discharge Atalaya was made somewhere between 9 and 10 a.m. on August 17, 2004. The Union's telegram demanding recognition was received by the Employer on that date at 9:36 a.m. While coincidences do happen, the timing of the events here, (from Friday to Tuesday), indicates to me a high degree of probability that the Employer's decision to discharge Atalaya was predominately influenced by the receipt of the Union's telegram, especially after Atalaya had assured Vincent Anza on the previous Friday that he knew nothing of a union.

In short, the circumstantial evidence demonstrates a preponderance of evidence that the Respondent's decision to discharge Atalaya was because of his, and the other employees activities in joining and assisting the Union. In my opinion, the Employer has not demonstrated that it would have discharged Atalaya for justifiable reasons other than his union activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F. 2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).[3]

The evidence regarding the other employees is not particularly ambiguous and by the Respondent's own account, shows that it violated Section 8(a)(1) and (3) of the Act.

When the warehouse employees heard about Atalaya's discharge, they started to talk about it amongst themselves. The General Counsel produced evidence that Vincent Anza came by and said; "If you want to follow your leader, follow him." At this point the warehouse employees left the warehouse and gathered outside on the street in what must have looked like a work stoppage. Although the General Counsel contends that Anza's words, the Respondent discharged the warehouse employees, I cannot come to that conclusion because the words by

[2] To the extent that he questioned Angad about the Union, this would not be violative of the Act, inasmuch as the parties stipulated that he was a statutory supervisor.

[3] I note that it has not been my experience that employers will confess in litigated cases that they have discharged an individual because of his union or protected concerted activity. Nor has it been my experience that the General Counsel has been able to find a "smoking gun." For those of us who have had the opportunity to try or hear these types of cases the "proof" almost always comes down to evaluating the circumstances in which the discharges take place. And in this regard, the standard of proof is by a preponderance of the evidence. This is a civil case and does not require either the standards of "beyond reasonable doubt" or "clear and convincing evidence."

themselves are too ambiguous for a reasonable person to conclude that they should be construed as a discharge.

Assuming however, that the employees were not immediately discharged but went out on strike, the evidence establishes that this was an unfair labor practice strike because it was prompted by the discharge of Atalaya, who as previously noted, was discharged in violation of Section 8(a)(3) of the Act.

The credible evidence shows that at about 2 p.m. on August 17, Union Representative El-Haq arrived at the facility and asked the Employer to put these people back to work. This request was ignored and the Respondent's own evidence is that it prepared termination notices to the employees whom it considered to be on strike. And in some cases, it attempted to deliver them by hand.

Since the employees who were engaged in a strike were engaged in what I would define as an unfair labor practice strike, the Employer's failure to reinstate them to employment immediately upon the offer to return to work, constitutes a violation of Section 8(a) and (3) of the Act. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (l956); *Drivers Local 662 v. NLRB*, 302 F.2d 908 (D.C. Cir., l962); *Northern Wire Corp*. 291 NLRB 727 (1988); *Workroom For Designers Inc*., 274 NLRB 840, 856 (l985).

Moreover, even if I concluded that this was an economic strike, the result would be the same. For one thing, the Employer has not demonstrated that the replacements it hired were permanent as opposed to temporary replacements. Thus, although an employer may be justified, in accordance with *Laidlaw Corp*., 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), in hiring permanent replacements and refusing to recall economic strikers until vacancies occur, that defense is not applicable if the employer has hired temporary replacements. *Montauk Bus*, 324 NLRB 1128 (1997). Where replacements are hired for striking employees, the Board has held that the presumption is that replacements are temporary and that the burden of proof is on the employer to show that the replacements are permanent. *Hansen Bros. Enterprises*, 279 NLRB 741 (1986); *O. E. Butterfield, Inc*., 319 NLRB 1004 (1995).

Secondly, the evidence shows that the Union asked Employer to reinstate the employees on the afternoon of August 17 and repeated an unconditional offer to return to work on August 25 by telegram. Yet despite these offers, the Respondent ignored them and continued to hire replacement workers thereafter.

As the evidence shows that the Respondent, as of August 17, 2004, decided to discharge the striking employees, and thereupon failed to reinstate them upon offers to return to work, I conclude that the Respondent has violated Section 8(a)(1) and (3) of the Act.[4]

Finally, given the fact that the Respondent has illegally discharged the larger part of its work force and replaced them with new employees, it is my opinion that a fair and free election is not possible even if the unfair labor practices were to be remedied within even a reasonable period of time. *NLRB v. Gissel Packing Co*., 395 U.S. 575 (l969); *NLRB v. Jamaica Towing, Inc*., 632 F.2d 208, 212, (2d Cir. 1980). Accordingly, as the Union by the time it demanded recognition on August 17, 2004 had obtained authorization cards from a majority of the employees in an appropriate bargaining unit, I conclude that the Respondent violated Section 8(a)(1) and (5) of the Act and shall recommend that a bargaining order be granted in this case, effective from August 17, 2004.

[4] The Respondent put into evidence a flyer that was handed out by the Union and striking employees who asked its customers to buy their products from someone else. This, to my mind is not sufficient to establish striker misconduct or disparagement of the employer's product so as to make the strikers ineligible to return to work. *Montauk Bus* supra at page 1136.

CONCLUSIONS OF LAW

1. The Respondent, National Steel Supply Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Brotherhood of Trade Unions, Local 713, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time drivers and warehouse employees employed by the Respondent at its Bronx, New York facility; but excluding all office employees, clerical employees, and guards, professional employees and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since August 17, 2004, the Union has been and is the exclusive representative of all employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. Since August 17, 2004, the Respondent has refused and is refusing to bargain collectively with the Union and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. By discharging Eric Atalaya in retaliation for his union membership and support, the Respondent has violated Section 8(a)(1) and (3) of the Act.

7. By discharging the employees who engaged in a strike on August 17, 2004, the Respondent has violated Section 8(a)(1) and (3) of the Act.

8. By interrogating employees about their union membership or activity, the Respondent has violated Section 8(a)(1) of the Act.

9. By threatening employees with job loss if they support a union, the Respondent has violated Section 8(a)(1) of the Act.

10. The unfair labor practices committed by the Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged employees, it must, to the extent it has not already done so, offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of

discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

I further recommend that the Respondent be required to expunge from its records any reference to the unlawful discharges. Finally, I recommend that a bargaining order be granted.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, National Steel Supply Inc., its officers, agents, successor, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their union membership or activity.

(b) Threatening employees with job loss if they support a union.

(c) Discharging or otherwise disciplining employees because of their support or activities on behalf of International Brotherhood of Trade Unions, Local 713 or because they engaged in a strike.

(d) Refusing to bargain collectively with the Union as the exclusive collective bargaining agent of its drivers and warehouse employees located in the Bronx, New York.

(e) In any like or related manner, interfering with, restraining or coercing employees in the exercise of their Section 7 rights.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time drivers and warehousemen employed by the Respondent at its Bronx, New York; but excluding all office employees, clerical employees, and guards, professional employees and supervisors as defined in the Act.

(b) Within 14 days from the date of this Order, offer Eric Atalaya, Graciano Aguilar, Carlos Cruz, Roberto Gonzalez, Sotero Gonzalez, Marcelino Maldonado, Felipe Mencias, Policarpo Mencias, Narcizo Rodriguez, Adrian Umanzor, Jorge Flores, Artemio Ramirez, Alejandro Tale, Maximino Flores, Tomas Flores, Ryan Naipaul, Porfirio Perez, Telesforo Perez, Heriberto Sanchez, Sergio Batres, Sergio de la Cruz, Jose Gonzalez, Jose Luis Hilaro, Juan Carlos Restrepo, Jamie Sanchez and Edgar Ochoa, full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the Remedy section of this decision.

(c) Make whole, with interest, the employees named above for the loss of earnings they suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful actions against the abovenamed employees and within 3 days thereafter, notify them in writing, that this has been done and that the discharges will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facilities in New York, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, or sold the business or the facilities involved herein, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since August 16, 2004.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 23, 2004

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise retaliate against our employees because of their union membership, activities or support.

WE WILL NOT interrogate employees about their union activities.

WE WILL NOT threaten our employees with discharge or job loss or other reprisals because of their membership in or support for a union.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the rights guaranteed to them by Section 7 of the Act.

WE WILL on request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time drivers and warehousemen employed by us at our Bronx, New York; but excluding all office employees, clerical employees, and guards, professional employees and supervisors as defined in the Act.

WE WILL offer Eric Atalaya, Graciano Aguilar, Carlos Cruz, Roberto Gonzalez, Sotero Gonzalez, Marcelino Maldonado, Felipe Mencias, Policarpo Mencias, Narcizo Rodriguez, Adrian Umanzor, Jorge Flores, Artemio Ramirez, Alejandro Tale, Maximino Flores, Tomas Flores, Ryan Naipaul, Porfirio Perez, Telesforo Perez, Heriberto Sanchez, Sergio Batres, Sergio de la Cruz, Jose Gonzalez, Jose Luis Hilaro, Juan Carlos Restrepo, Jamie Sanchez, and Edgar Ochoa, who have been found to have been illegally discharged, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL make whole the employees named above for the loss of earnings they suffered as a result of the discrimination against him.

WE WILL remove from our files any reference to the unlawful discharges which have been concluded to be unlawful and notify the employees in writing that this has been done and that these actions will not be used against them in any way.

NATIONAL STEEL SUPPLY, INC.